United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2072

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-2072

EDWARD MALLEY, JR.,
Petitioner - Appellee

vs.

JOHN MANSON, COMMISSIONER
OF CORRECTION,
Respondent - Appellant.

Respondent's Appeal from a Judgment of The United States District Court for the District of Connecticut.

RESPONDENT'S BRIEF

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CONNECTICUT GENERAL STATUTES

Sec. 19-480(b) PENALTY FOR ILLEGAL MANUFACTURE, SALE, PRESCRIPTION, ADMINISTRATION.

• • • • Any person who manufacturers, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled drug other than a narcotic drug or cannabis-type drug, except as authorized in this chapter, may, for the first offense, be fined not more than one thousand dollars or be imprisoned not more than two years or be both fined and imprisoned; and, for each subsequent offense, may be fined not more than five thousand dollars or be imprisoned not more than ten years, or be both fined and imprisoned. • • • •

Sec. 19-481(b) PENALTY FOR ILLEGAL POSSESSION.

• • • • Any person who possesses or has under his control any quantity of any controlled drug other than a narcotic drug, except as authorized in this chapter, may be fined not more than one thousand dollars, or be imprisoned not more than one year, or be both fined and imprisoned. • • • •

CONNECTICUT PRACTICE BOOK

Sec. 652 ERRORS CONSIDERED

This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court acted properly in granting the Petition on the grounds of an improper jury argument, which issue was not raised by trial counsel and therefore was not considered by the Connecticut Supreme Court.

II. Whether the District Court acted properly in ruling that the Petitioner was denied a fair trial by the conduct of the prosecutor throughout the trial, but especially in his closing argument to the jury.

STATEMENT OF THE CASE

The Petitioner was convicted by a jury of one count of possessing a controlled drug (LSD) and one count of selling the same drug, in violation of Sections 19-480b and 19-481b of the Connecticut Statutes. His convictions were affirmed by the Connecticut Supreme Court. Initially, the Petitioner had been accused of one count of possession and two counts of sale. However, a not guilty verdict was returned on the second sale charge (Information's third count) at the direction of the trial judge.

On the appeal where the Petitioner was represented by counsel, other than his trial attorney, and for the first time, the issue of the prosecutor's conduct was raised.

With respect to the prosecutor's argument, that court declined to consider the claim of error because there was no record, since it had not been raised at the trial level either by proper objection or by a request for a corrective instruction.[1] Since the record, before it, did not disclose such an exceptional circumstance which would warrant a departure from established appellate procedure,[2] the Court declined to consider the claim.

STATEMENT OF FACTS

On November 19, 1970, the first day of the two day trial, Officer Robert Laviana was called to the stand. Officer Laviana, who was bearded and long-haired when he appeared as a witness, testified that he was a Waterbury Policeman who, at the time of the trial, was attached to the Special Service Squad with the specific duty of purchasing narcotics from dealers and that such was his duty on the preceding August 21.[3] It was on August 21, 1970, that Officer Laviana had dealings with Mr. Malley. Their first encounter took place, in Waterbury, at approximately 3:00 P.M. when a conversation ensued between Mr. Malley, who was in a car with someone else and Laviana, who was in another car with Richard Staebler at the intersection of Thomaston and Chase Avenues.[4] Staebler was a Middlebury policeman who was also attached to the Special Service Squad.[5] In this conversation, Mr. Malley asked if the officers wished to buy some LSD and they answered affirmatively. Mr. Malley said he did not have the LSD with him but that he would meet them, in about one-halt hour, at the corner of South Main and McMahon Streets near "Butch's" restaurant.[6]

The officers parked their car on McMahon Street. At approximately 3:40 P.M., Mr. Malley and his passenger drove up in a late model blue Chevrolet bearing a Connecticut license plate number "GH-158" which he parked and then walked over to the officers' car. After some dickering as to price, the Officers agreed to pay $25.00 for seven tablets of LSD of which sum $10 was contributed by Laviana and $15 by Staebler. On receipt of the money, Mr. Malley handed seven small round reddish tablets or pills to Staebler.[7]

Cross-examination of Officer Laviana brought forth the fact that he had qualified as a police officer on January 5, 1970.[8] It also established that Mr. Malley had driven the same car, at both meetings, and on

McMahon Street he had parked it in front of the officers' car so that they were able to observe its marker number.[9] Officer Laviana had made two reports of the incident both of which were placed in evidence by Mr. Malley. One report was made immediately after the "buy" and the other one was made one or two days afterward. Both reports contained the correct license plate marker number of Mr. Malley's car.[10]

On the defense attorney's cross-examination of Laviana, he attempted to impeach the witness' credibility through purported discrepancies between the witness' testimony and his written reports.[11] This line of questioning led to a redirect examination that showed Laviana to have participated in approximately 100 purchases of narcotics and controlled drugs.[12] On recross-examination, trial defense counsel asked Laviana if he "ever experienced or experimented with the use of narcotics?"[13] Laviana's negative answer promoted a (re) redirect answer that although he had never used narcotics or LSD, he had seen people who did and had observed the effect which these drugs had on their lives.[14]

Lt. Griffin, the officer in charge of the Special Service Squad, was the State's next witness.[15] On direct examination, without objection, he testified that, at the time of the trial, Laviana and Staebler were and, for some time past, had been undercover agents who worked as a team in making purchases of narcotics and controlled drugs.[16] On cross-examination, Lt. Griffin was asked if undercover officers reported directly to the police station and he answered "No".[17] He explained his answer, without objection, on redirect examination by saying it was so that their identities would not be compromised.[18]

The State's third witness was Officer Staebler whose testimony corroborated Laviana's prior testimony concerning two meetings with Mr. Malley on August 21, 1970 and the purchase of the seven tablets at the

second one.[19] On cross-examination, defense attorney asked Staebler, as he had asked Laviana earlier, whether the officer ever had experienced or had experimented with the use of narcotics.[20] Again, this type of cross-examination brought forth testimony, on redirect examination, that Staebler was familiar with people who used prohibited drugs and was familiar with the effects which these drugs had on their users.[21]

After the testimony of witnesses who had participated in the custody of the seven pills and their delivery to the State Laboratory,[22] Dr. Stolman, the State's Toxicologist, was called as a witness.[23] Dr. Stolman testified that his analysis of the seven tablets showed that they contained LSD, a hallucinogenic drug. In response to the question of what was a hallucinogenic drug, Dr. Stolman answered "It produces hallucinations; it's a mind-expanding drug"[24] The State's Attorney then asked "And does this have any reference to - LSD to the term 'good trip' or 'bad trip' in your experience". Dr. Stolman answered "Well, it's associated with that - -" when defense counsel objected.[25] The trial judge sustained the objection and instructed the jury to disregard the terms "good trip" and "bad trip".[26] Thereafter, the trial judge refused to permit further questions, of Dr. Stolman, by the State as to the effect of a hallucinogenic drug on a person's mind.[27]

Mr. Malley who testified at the State trial admitted, on direct examination, that he owned a 1970 blue and black Chevrolet and that its marker number was "GH-158".[28] But he denied that he knew or had ever seen either of the two undercover officers prior to the trial.[29] Contrary testimony had been given earlier by Officer Staebler who had said that, in the course of his investigation, he had seen Mr. Malley many times.[30] Mr. Malley's direct examination then proceeded as follows:[31]

"Q: Did you on the (August) 21st offer to sell them LSD?

A: I don't sell LSD.

Q: Did you in effect sell them any LSD?

A: I did not.

Q: Did you ever use narcotics?

A: No I have not.

Q: Do you know what LSD is?

A: Well, all I know is what I have read about it or seen on television."

Mr. Malley's cross-examination included the following questions and answers:[32]

"Q: All right. Now, I think you told Mr. Mellon that you don't sell LSD?

A: That is right.

Q: Is that right?

A: Yes.

Q: Do you know what the price of LSD is in Waterbury on the street?

A: No, I don't. I have no idea.

Q: You have no idea what the price is?

A: No.

Q: And you told Mr. Mellon and told this jury that all you know about LSD is what you heard about it and seen on television?

A: Right.

Q: What you have read about it and seen on television?

A: Yes.

Q: You know it is a dangerous drug?

A: That is for sure.

Q: You know that it can cause permanent damage to people that use it don't you?

A: I suppose it can. I wouldn't know. I never sampled it.

Q: You have read or seen about it on television, haven't you?

A: Yes, I have.

Q: It is a so-called psychedelic drug?

A: Yes, it is, I imagine.

Q: People have good or bad trips on it?

MR. MELLON: I will object to this.

MR. McDONALD: Mr. Mellon went into it.

THE COURT: I will allow it.

MR. MELLON: May an exception be noted?

THE COURT: Yes.

MR. MELLON: For this reason: I don't think he is an expert to testify.

THE COURT: If he doesn't know, he can say he doesn't know. He realizes that.

Q: You know that people can have bad trips on LSD. You have heard that?

A: I have seen it on television.

Q: And they can go off?

A: I have read different articles about it, where something like that happened.

Q: You wouldn't have anything to do with selling that to young people, would you?

A: I wouldn't sell it to anybody.

Q: You know it is deadly stuff, don't you?

A: It sure is."

Much of the trial was occupied by matters which, although not directly encompassed in habeas review,

do have a bearing on Mr. Malley's reference to lengthy jury deliberations.[33] The trial started, as previously mentioned, on [Thursday] November 19, 1970. At the close of the court session on that day, the trial adjourned until Monday, November 23.[34] The State rested its case in the morning of that date.[35]

In the presentation of Mr. Malley's case, a claim of alibi as well as a claim of non-involvement was made. The substance of the alibi concerned a theft of a [cassette] tape player from Mr. Malley's car on August 20, 1970[36] and his doings regarding that theft the next day. His testimony was that about 2:30 P.M., he drove from his home, in the Washington Hill section of Waterbury to the J&L Stereo store on Railroad Hill Street as he had purchased the tape player there and needed a receipt for insurance purposes.[37] From the J&L Stereo store, he drove directly to Webster's Insurance Agency where he arrived about 3:40 or 3:45 P.M. and where he and his Chevrolet (Marker No. GH-158) remained until about 4:35 P.M.[38] Although Mr. Malley admitted to being a regular customer of Butch's restaurant[39], his presence at Webster's Insurance Agency meant that he could not have been with the undercover officers when the sale was made.[40] Personnel from both J&L Stereo and Webster's Insurance Agency were called as witnesses to support Mr. Malley's alibi.[41]

Mr. Malley predicated his stay at Webster's Insurance Agency by reference to a telephone call which he said was received about 4:00 P.M. and which concerned the death of someone connected with the agency.[42] The person, at Webster's, to whom Mr. Malley had spoken testified that he was with him about ten minutes when the receptionist received a call from Waterbury Hospital which reported the death of the father of the agency's owner but that Mr. Malley was not present when an earlier telephone call was received that the owner's father was being taken to the hospital from his home in Naugatuck.[43]

In rebuttal, the State produced three witnesses who established that the Naugatuck Police Department, in response to a doctor's call, had dispatched an ambulance to transport the father of the owner of Webster's agency to Waterbury Hospital at 4:00 P.M.[44]; that the ill person died en route to the hospital where his body arrived at 4:15 P.M.[45]; and that the owner of Webster's learned of his father's death when he arrived at the agency at 4:30 P.M.[46]

Arguments of counsel took place on November 23, 1970 from 2:24 - 3:05 P.M.[47] No objections were taken as to the State's opening argument[48] in which the State's Attorney suggested "(T)here has been absolutely no testimony presented before you to suggest why these two young men, who bought the LSD and who have been very active in buying narcotics would come in here and lie, lie, first of all, about Mr. Malley, and lie, secondly, about the [automobile] registration marker that you have heard the evidence about here today.[49] In the course of arguing for the defense[50], defense trial counsel spoke of the mistaken identity of his client and, near the end, emphasized that policemen have been known to make serious mistakes.[51] Then counsel continued "And, as I say to you, I do not envy the position, nor would I care to be serving on the jury to have the responsibility that you people have in this particular case. It is a serious matter. I say I don't want to minimize the fact that narcotics is a big, big problem and I can be assured that as soon as I sit down, I can only anticipate what the State's Attorney is going to try and bring out".[52]

In his closing arguments the State's Attorney made the following remarks:[53]

> "The basic issue I submit in this case is whether you believe the police officers or whether you believe this accused, Mr. Malley. The police officers have testified here before you. They have blown their

cover. They come in here and testify before you, two excellent trained investigators, undercover men who, you heard their testimony, purchased over a hundred various items of heroin, LSD, and other controlled drugs. They have come in and we have lost them as undercover men due to this case, but we put them on here as witnesses before you, because this LSD problem and the sale of it is such a serious offense.

Now, it is a question if you believe them. They came in here and they swore to tell the truth and they identified this accused before you as the man from whom they purchased the LSD, the seven little tablets.

Now, this question of narcotics - - and I shouldn't use the word "narcotics" with respect to LSD, because actually, it is not a narcotic drug. It is a controlled drug. This question of the use of these psychedelic or hallucinogenic drugs has inflamed our country and has put many of us to asking questions about the use of this drug by our young people.

We often hear the expression the drug scene. And when we think of the drug scene, we think of what we see on television, what we hear about, the group in Greenwich Village, young people dressed in hippie style using marijuana, LSD, speed, some one of these other drugs who turn on, but that is not the drug scene as we see it. That is not the drug scene as you have seen it here portrayed before you twelve people on this jury.

What you have seen here is the sale of seven little tiny pills for $25, almost $3.60

apiece. That is a commercial business and it is designed to destroy the youth of our country and it is doing so. And it is carried on by men like Mr. Malley who sell indiscriminately, so indiscriminately that once in a while they make a mistake and they sell to two bearded, funny, easy to get along with fellows that drive around in an old car.

(Petitioner's trial counsel)

MR. MELLON: If your Honor pleases, there has not been one bit of evidence that these undercover agents are funny.

THE COURT: That is correct. Please disregard that, ladies and gentlemen. Please disregard the business about driving around in an old type car, too, as there is no evidence on that.

MR. McDONALD: They go around with a beard and attempt to buy these drugs, and they succeeded. But something went wrong with Mr. Malley this time because these men came into Court and testified before you ladies and gentlemen of the jury.

Now, he asks you to disregard that testimony, to say that their testimony is not really believable, that they are wrong, that they made a mistake, and that he is telling the truth, and not them. And it turns out that he has, and you could consider it on his credibility, a prior record for breaking and entering.[54] He testified to that. He admitted that he pleaded guilty here in this Court.

So it is a question of whether you believe him or whether you believe these officers.

Now, with respect to this drug scene, there are a few people fighting it and a few of them are the two that testified here. There aren't many others, and we have lost them due to this trial.

Now, you might ask yourselves, Why can I be sure that the undercover men are telling the truth? Well, let's examine the evidence.

They testified that they met this accused and made arrangements to purchase a narcotic or a controlled drug, LSD; that afterwards, after the arrangements were made, they were told to go to near Butch's Restaurant at the corner of McMahon and South Main Streets, to meet the accused.

Now, you will recall the accused's testimony that he hangs around or is a customer of Butch's Restaurant, on the corner of McMahon and South Main Street.

You further heard the officers testify that on the day in question and the day one of their reports, Defendant's Exhibit 2, was made out on that day in question, they noticed the license plate number of the car being operated by the man that sold them the LSD, and they wrote it down that day, GH-158. That car, and the evidence has been produced, and admitted by the defendant, was the defendant's car.

Now, further, the officers testified that they went to the scene and purchased the seven pills of LSD, which were told by Mr. Malley to them to be LSD.

Now, you have the evidence in Court, the evidence turned over by the officers

to Lt. Griffin, seven tablets, and the legend on the card, on the envelope in which the tablets were sealed, seven pink pills, LSD tablets, purchased by the undercover men. So they did in fact on the 21st of August purchase these pills.

Now, what were the pills? The pills were sent to the laboratory in Hartford, and as described and as paid for, they were found to contain the LSD.

Now, the officers further testified that they met Malley that afternoon in the Waterville section of Waterbury, and after making arrangements to purchase the LSD, they went down to the area of Butch's Restaurant to make the sale, and they made the sale there on the day, the 21st of August, 1970.

Now, you will recall that the accused testified that the 21st of August, 1970, was a Friday; that he worked every other day, but this happened to be his day off. This happened to be a day when he wasn't working, as he told you, for his father in the plumbing business, or some business that his father had. This was a day off. So that fits. I submit that the car, the identification and the day off, all fit with relation to the testimony of the undercover men, and that their testimony should be believed by you.

Now, I submit that this case comes down to credibility between the defendant and the officers. With respect to the testimony of the people at the insurance agency, I think the State has shown that there is a serious question as to what time Mr. Malley was at the Webster's Insurance

Agency that afternoon; that perhaps he was there, and I submit the evidence must be pretty well established now, not when the first phone call was made, not when the call was made that Mr. Brady had been removed from Naugatuck and brought to the Waterbury Hospital, which we submit was made about four o'clock, but that he was there later, sometime after 4:15 after Mr. Brady had arrived at the hospital, and had been declared dead on arrival by the examining doctor. And I think that is the testimony that is before you members of the jury.

Now, that testimony is entirely consistent with the testimony of the police officers that at about 3:50, shortly before four o'clock that afternoon, they purchased this LSD for the price stated.

Now, ladies and gentlemen of the jury, as Mr. Mellon says, you have a serious and solemn responsibility here to decide the guilt or innocence of this accused. You also have a serious responsibility to society for, as has been said many years ago, 'To let the guilty go free is to do thereafter with their hands all the crimes they may subsequently commit'.

You ladies and gentlemen of the jury are aware of the problem in our society caused by drugs. This is your opportunity to return a verdict that reflects that concern. The State has submitted direct eyewitness evidence of police officers in respect to this man, and we respectfully suggest that the only verdict possible in this case is a verdict of guilty".

The trial judge's instructions[55] to the jury lasted from 3:05 P.M. until 3:45 P.M.[56] Thereafter, the jury started their deliberations until 5:25 P.M. when they adjourned for the day.[57]

On November 24, 1970, the jury started to deliberate at 10:25 A.M.[58] At 12:35 P.M., the jury requested a reading of all of the testimonies of Officer Laviana and Mr. Young who was the man with whom Mr. Malley had spoken at Webster's Insurance Agency.[59] The reading of testimony took from 12:37 P.M. until 2:25 P.M. with an interuption for lunch.[60] After the reading was completed, the jury returned to deliberate until the rendition of the verdicts at 5:30 P.M.[61]

Except for the objection by defense counsel as set forth in this excerpt, defense counsel made no objection to the trial judge concerning the State's Attorney's remarks and did not ask the trial judge to take an action or charge the jury in any manner concerning the quoted remarks.

During his charge, however, the trial judge did instruct the jury as follows concerning claims of counsel:

> "It is also your duty and your sole duty to decide the facts of the case as you find the evidence may have disclosed them."
>
> . . . . . .
>
> You are the sole judges of the facts, the sole judges of whether or not they are sufficient to demonstrate the guilt of this accused or whether they do demonstrate his innocence. The opinions of either counsel as stated to you in their arguments are in no way binding upon you in your determination of the facts, although you should weigh the arguments of the attorneys as to the facts. It is your recollection of the evidence that controls, not mine, or not that of the attorneys, but your recollection controls."

ARGUMENT

I.

IN THE ABSENCE OF ANY ACTION BY DEFENSE COUNSEL CONCERNING THE PROSECUTOR'S JURY ARGUMENT BEFORE THE STATE TRIAL JUDGE, THE WRIT SHOULD NOT HAVE BEEN ISSUED.

It is clear from the record, and the District Judge also concluded, that no objection, no motion to strike or expunge, no request to charge and no motion for mistrial was made by petitioner's attorney concerning the State's Attorney's jury argument and claimed prejudicial conduct during his state court trial.

The Supreme Court of Connecticut, because of counsel's failure to take any action whatsoever stated there was no record on which it could properly review any ruling of the trial court. **State vs. Malley** 167 Conn. 379 at page 387. That court held the failure to take exception to the State's Attorney's remarks either when made or at the close of his argument was a waiver of appellate review in that regard. In the absence of a record demonstrating "exceptional circumstance" the Connecticut Supreme Court refused to "consider the claim not raised at the trial level".

State vs. Malley, supra,
at page 387 and 388

The District Court, however did entertain the claim and did grant the writ on the basis of the State's Attorney's jury argument and claimed prejudicial conduct. As reflected in its memorandum of decision, the issue of the petitioner's failure to take any action through counsel before the State trial judge was raised before the District Court and overruled when the writ was granted.

It was also pointed out to the District Court that defense counsel did object to certain other remarks during argument by the State's Attorney.

In **Estelle vs. Williams**, —U.S.—, 19 Cr. L. 3061, the United States Supreme Court held that the petitioner's failure through counsel to object to the wearing of prison clothing during his trial, absent sufficient reason to excuse the failure to raise the issue before trial, negates the compulsion element required to invoke federal constitutional jurisdiction over a state court proceeding. Concurring, Justice Powell and Stewart pointed out that they rested their decision upon the defense counsel's "inexcusable procedural default" in failing to object at a time when a substative right could have been protected.

Mr. Justice Stewart's concurrance in **Estelle**, should be considered in reading **Francis vs. Henderson**, —U.S.—, 19 Cr. L. 3072, decided the same day. In the **Francis** case, defense counsel's failure to object to the composition of the grand jury before trial was held to bar later consideration of his claim of constitutional deprivation in the federal courts. Since the state rule which required that failure to object be considered a waiver was designed to avoid untimely assertion of constitutional rights and give finality to trials, as was Rule 12, Federal Rules of Criminal Procedure, comity and concerns for the orderly administration of criminal justice required the federal courts give similar effect to such inaction in habeas corpus proceedings.

In this case, the Supreme Court of Connecticut held that the petitioner's failure to object or take any action whatsoever concerning the State's Attorney's argument and claimed prejudicial conduct was a waiver of the petitioner's right to press such an assignment of error in that court.

In so holding, that Court pointed out that Connecticut Practice Book **Section 652**, and many cases in that court have repeatedly held that:

> "this court will not consider claimed errors on the part of the trial court unless there has compliance with the provisions of Section 652 of the Practice Book."

The Connecticut Supreme Court also noted because of the failure to object at the trial there was no record before it to properly review this issue in the context of all the evidence produced at the trial. Although it could review the issue if "exceptional circumstance" was shown in the record, the record did not disclose such circumstance and the Connecticut Supreme Court, therefore, refused to consider the claim not raised at trial.

The established Connecticut procedure and the Connecticut cases which for many years have held that a failure to object is a waiver of appellate review were designed to effect the same policies of presenting an opportunity to cure a defect at trial and to give finality to trials as the procedures applied to Federal Habeas Corpus cases in the **Francis** case. It is submitted that the United States Supreme Court decided the **Estelle**, **Francis** and most recently **Stone vs. Powell**, —U.S.—, (July 6, 1976) 19 Cr. L. 3333 to offer guidance to the Federal courts in considering habeas corpus review of state prosecutions. Included in that guidance is the policy that state court rules designed to require possible remedial action at the trial level and, thereby, to effect finality, are to be honored in the Federal Courts.

For these reasons the District Court should have honored that comity and given consideration to the finality requirements of Practice Book **Section 652** and denied the petition.

II.

THE PROSECUTOR'S ARGUMENT DID NOT REQUIRE THE GRANTING OF THE PETITION.

In this case, two (2) undercover police officers gave direct eyewitness testimony of their purchase of drugs from Mr. Malley. In the course of their dealings they correctly noted down his marker number and reported it to their superior officer. It is submitted that this was a strong case for conviction.

With respect to the claim of improper conduct by the State's Attorney and prejudicial jury argument, the respondent submits that the very failure of defense counsel to raise this claim at trial negates the existence of such prejudice. As will be pointed out later in this brief, the District Court found prejudice in some of the prosecutor's remarks by imputing a meaning to his argument that appellate counsel in the Connecticut Supreme Court did not argue before that court.

In an attempt to discredit eyewitness police, the defendant interjected into the case for the first time on cross examination the issue of the officers themselves using L.S.D. The questions designed to show the officers did not use and did not intend to use these drugs because of their effect was certainly proper and were not objected to by trial defense counsel.

During his examination of Mr. Malley, defense counsel asked Mr. Malley if he ever sold drugs or used drugs. Mr. Malley was asked if he knew what L.S.D. was and replied he only knew about drugs from watching television. On cross examination he was questioned about his knowledge of those drugs, without objection save that he was not an expert on drugs.

During summation, the defense counsel invited the State's Attorney to comment upon the seriousness of the

crime of dealing in L.S.D. The prosecutor's comments were in response to his argument since they did not occur in his opening argument and only after the defendant had made his summation.

With respect to the statement that the agents were "lost" becasue of their testimony, there was evidence in the record that they went about disguised and did not even report to police headquarters to avoid being compromised. That their testimony compromised them was apparent to the jury without comment by the prosecutor. Again, as pointed out in part one of this brief, no objection or other action was taken by trial defense counsel at that time.

The District Court read into the prosecutor's argument a claim that the prosecutor was intimating knowledge of other drug sales by Mr. Malley. However, an examination of the entire argument (again without any objection or action by trial defense counsel) does not fairly require that interpretation. In no way in the argument did the prosecutor claim Mr. Malley sold to other people on other dates. What could be inferred and what was said in the argument was that Mr. Malley sold drugs without discrimination and to police undercover agents to his misfortune. To read the prosecutor's remarks as requiring the inference that Mr. Malley had sold drugs on other occasions was not required. In fact, petitioner's appellate counsel did not raise this claim or propose this inference in his brief to the Connecticut Supreme Court. (Exhibit #3)

The District Court's also relied upon **U.S. ex rel Haynes vs. McKendrick**, 481 F. 2d 152 (2nd Cir. 1973) and **Peny vs. Mulligan**, 399 F. Supp. 1285 (D. N. J. 1975) for the proposition that the prosecutor was associating the defendant with "an unpopular or feared group" and asking for a conviction on that basis. The only statement the prosecutor made was that the verdict should reflect the jury's concern over drugs and

then enforce the law as required of them by the direct eyewitness testimony of two undercover police officers.

In **Donnelly vs. DeChristofaro**, 416 U.S. 637 (1974), 40 L. E. 2nd. 431, the United States Supreme Court reversed the Court of Appeals which had found the prosecutor's argument so improper as to require a new trial for first degree murder. In so doing the United States Supeme Court judged the prejudice of the prosecutor's remarks "in the context of the entire trial."

The remark focused upon, the prosecutor's observation that the defendant hoped to be found guilty of a lesser offense, was objected to by trial counsel and the trial judge instructed the jury to disregard it. The Supreme Judicial Court of Massachusetts thought the remark improper but not so prejudicial as to require a mistrial.

The United States Supreme Court held the standard of federal review under habeas corpus to be that the remarks of the prosecutor must so infect the trial by itself with such unfairness as to make the resulting conviction a denial of due process. In rejecting a highly prejudicial analysis of the remark as "by no means clear" and stating it was not even probable the jury would seize the remark out of context and attach that particular meaning to the remark, The United States Supreme Court made clear a showing similar to a "consistent and repeated misrepresentation" is necessary to invoke federal habeas corpus. The United States Supreme Court pointed out such arguments are seldom carefully constructed in total before delivery and are improvised.

In judging the remarks of the State Attorney here by these standards it is clear that no such showing of "consistent and repeated misrepresentation" exists.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reserved.

John Manson, Commissioner of Correction

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BY Bradford J. Ward
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at Waterbury

FOOTNOTES

1. **State vs. Malley** at 4.
2. id. at 4, 5
3. Exhibit 5 pp. 13-14
4. id. p. 16
5. id. p. 60
6. id. pp. 16-17
7. id. pp. 17-18, 21, 23
8. id. p. 24
9. id. p. 32
10. id. pp. 26-27, 32-33, 36-37
11. id. pp. 28, 35
12. id. pp. 37-38
13. id. p. 39
14. id. p. 40
15. id. p. 41
16. id. pp. 42, 44-45
17. id. p. 57
18. id. p. 59
19. id. pp. 60-68
20. id. p. 84
21. id. p. 85
22. id. pp. 104-131
23. id. p. 132
24. id. p. 142
25. id.
26. id.
27. id. pp. 142-144
28. Exhibit 6 p. 170
29. id. p. 176
30. Exhibit 5 p. 61
31. Exhibit 6 p. 176
32. id. pp. 184-186

33. Petition par. 4
34. Exhibit 5 p. 150, Exhibit 6 p. 153
35. Exhibit 6 p. 166
36. id. p. 169
37. id. pp. 170, 172, 173
38. id. pp. 174-175, 183, 205
39. id. pp. 176, 189
40. id. p. 175-176, 180
41. id. pp. 230-253
42. id. p. 183
43. id. pp. 244-250, 252, 253
44. id. pp. 255-267, 269-276
45. id. pp. 277-285
46. id. pp. 287-289
47. Exhibit 2 p. 5
48. See Exhibit 7 pp. 2-8. The notation of "4:05" is obviously erroneous when compared to the further entries.
49. id. p. 8
50. id. pp. 8-25
51. id. p. 23
52. id. pp. 23, 24
53. id. pp. 25-31
54. Exhibit 6 pp. 176-180. On direct examination, Petitioner admitted a prior felony conviction for "breaking and entering."
55. Exhibit 2 p. 5
56. Exhibit 8 pp. 291-330
57. Exhibit 2 p. 6
58. id.
59. Exhibit 8 p. 332; Exhibit 2 p. 6
60. Exhibit 8 pp. 332-334; Exhibit 2 p. 6
61. Exhibit 2 p. 6